ownership of the money during life, but to secure its passage to the named beneficiary upon death. While it may be possible to effect this intention without violating fundamental principles, it is not clear that the New York decision is based upon the correct theory. The transaction must plainly be taken as a present trust if anything, else we meet two difficulties: first, that we are allowing what is in substance a testamentary disposition in irregular form,[10] and second, that equity will not enforce an incomplete voluntary trust.[11] To call it a present trust and still effectuate the depositor's intention can only be done, perhaps with some effort, by finding a power of revocation impliedly reserved to the depositor, who, while the trust remains unrevoked, is trustee for himself for life, with full power of disposal, remainder to the named beneficiary. This theory, however, admittedly somewhat over-nice, does not seem to be the one the court proceeds upon, the apparent reasoning being that a trust of this kind is in its nature revocable during life, but made absolute by death. The idea of death perfecting the trust is clearly indefensible, for the trust if ever created was created at the time the deposit was made, and the sole question is whether the depositor then intended to create a trust of the complex character described.

That the doctrine of tentative trusts will grow by application to analogous cases is shown by a recent New York decision, *Lattan* v. *Van Ness*, 95 N. Y. Supp. 97, which held merely tentative a trust created by transfer of the deposit and the bank book to another as trustee for a third party. Unless this decision can be rested on a similar theory to that suggested above, it would seem a greater departure from principle than the earlier case, for the irrevocability of a trust created in this way was established much earlier and with a sounder basis than that created by mere declaration.

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EFFECT OF ACCEPTANCE ON RIGHT TO SUE FOR DEFECTIVE PERFORMANCE. — A question constantly arising under a contract of sale is whether acceptance of a tender of goods differing from the terms of the contract as to quality, quantity, time or place of delivery prevents a recovery of damages for the imperfect performance. If an express warranty of quality accompanying the sale has been broken, courts generally are agreed that a right of action survives acceptance.[1] But there is confusion in cases of implied warranties. Cases of this kind arise most frequently in reference to the merchantable quality of goods. The weight of authority is that mere acceptance does not prevent the buyer from afterward recovering for breach of promise, either by a separate action, or by counter-claim in an action brought by the seller.[2] Some courts, however, hold that such acceptance precludes any claim for defective performance.[3] On a similar question as to time of delivery, the Kentucky court recently stood evenly divided as to whether the buyer waived any cause of action for delay. *Lucile Min. Co.* v. *Fairbanks, Morse & Co.*, 87 S. W. Rep. 1121.

Though most courts in this class of cases, as in cases where inferior goods have been delivered, hold that mere acceptance does not prevent the buyer

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[10] See Nicklas *v.* Parker, 61 Atl. Rep. 267 (N. J.).

[11] See Bartlett *v.* Remington, 59 N. H. 364.

[1] See Mechem, Sales, 1st ed., § 1395.

[2] English *v.* Spokane Commission Co., 57 Fed. Rep. 451. See Williston's Cases on Sales, 2d ed., 779, note 1.

[3] Studer *v.* Bleistein, 115 N. Y. 316. See 16 HARV. L. REV. 465, 468.

from suing for delay,[4] there is considerable authority to the contrary, on the ground that he has waived his right.[5]

If by "waiver" these courts mean a gratuitous renunciation of a cause of action, once accrued, the cases cannot be supported, for such waiver is really a release, and to be binding must be founded on consideration;[6] though waiver of a defence need not be.[7] The term "waiver" is, however, used loosely in the cases, and it would be unfair to infer that courts always mean to allow a gratuitous release of a cause of action, for it is often possible to find consideration. The seller, after having broken his promise, is not bound to make a subsequent tender, so that such tender, being a legal detriment, may constitute the consideration for an accord. By this use of the term "waiver," then, courts may be taken to mean a contract to waive or, more accurately, an accord and satisfaction. Viewed in this way, the question becomes mainly one of fact, whether the parties actually made this new agreement. It should be clear that, when the buyer explicitly states that the subsequent tender is not taken as satisfaction, no new agreement can be found.[8] On the other hand, it should be equally clear that when the seller states or his conduct implies that the tender is an offer to an accord, the acceptance completes an accord and satisfaction which precludes the buyer from claiming damages for defective performance. The main conflict in the decisions is when neither party has said anything. In such a case it is difficult to find mutual assent to the new agreement. It seems more natural to suppose that the seller's late tender is an attempt to carry out the original contract to the best of his ability. His action, therefore, amounts to a waiver on his part of his right not to be compelled to make a late tender, which, as it is not a release of a cause of action, obviously requires no consideration. All doubts should be construed in favor of the buyer, since the seller alone has been at fault. Whenever, accordingly, tender and acceptance are made without explanation on either side, it may well be ruled, as a matter of law, that there is no evidence upon which a jury could find that the seller had satisfied the burden of proving an accord and satisfaction.

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# RECENT CASES.

ADMIRALTY — TORTS — LIABILITY OF SHIP FOR WILFUL TORT OF SEAMAN. — One of the crew of a steam-tug, acting outside the scope of his employment, wilfully blew off steam and hot water from the boiler so as to deluge the side of another tug. *Held*, that the former vessel is liable for the damage done. *The Bulley*, 138 Fed. Rep. 170 (Dist. Ct., S. D., N. Y.).

At common law, a master is liable only for those wilful acts of his servants which are done within the scope of their employment. *Mott* v. *Consumers' Ice Co.*, 73 N. Y. 543. And in admiralty by the English rule, it is doubtful whether the vessel can be proceeded against where the owner would not be personally

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[4] Redlands Orange Growers' Ass'n *v.* Gorman, 161 Mo. 203. See Garfield & Proctor Coal Co. *v.* Fitchburg R. R. Co., 166 Mass. 119.

[5] Roby *v.* Reynolds, 72 N. Y. 487; Minneapolis Threshing Machine Co. *v.* Hutchins, 65 Minn. 89.

[6] See Anson, Contracts, 10th ed., 334; 18 HARV. L. REV. 365.

[7] Sigourney *v.* Wetherell, 6 Met. (Mass.) 553; Uhler *v.* Farmers' National Bank, 64 Pa. St. 406

[8] Jones *v.* National Printing Co., 13 Daly (N. Y.) 92.